(3)

FILED
JUN 24 1997
CLERK

No. 96-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANTHONY W. CVELBAR,

Petitioner,

v.

CBI-ILLINOIS, INC.,
a Delaware corperation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

STEPHEN D. GAY
Counsel of Record
HUSCH & EPPENBERGER
101 S.W. Adams Street
Suite 800
Peoria, Illinois 61602
(309) 637-4900
Attorney for Respondent

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

13 pp

QUESTION PRESENTED FOR REVIEW

Should this Court issue a Writ of Certiorari to consider whether an employment agreement which provides deferred compensation to a member of a select group of management employees, which was one of five identical agreements providing deferred compensation to a select group of management employees, and which otherwise meets the requirements of an ERISA plan, can be an ERISA plan?

RULE 29.6 LIST

Respondent CBI-Illinois, Inc. is a subsidiary of Commerce Bancshares, Inc., and has no wholly or nonwholly owned subsidiaries.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
RULE 29.6 LIST	ii
TABLE OF AUTHORITIES	iv
BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	1
I. PETITIONER'S QUESTION PRESENTED IS NOT RELEVANT TO THIS CASE	2
II. THE COURTS OF APPEALS ARE NOT IN CONFLICT WITH RESPECT TO PETITIONER'S QUESTION PRESENTED	2
CONCLUSION	4
APPENDIX	*infra*

TABLE OF AUTHORITIES

	PAGE
Biggers v. Wittek Industries, Inc., 4 F.3d 291 (4th Cir. 1993)	3
Cvelbar v. CBI-Illinois, Inc., 106 F.3d 1368 (7th Cir. 1997)	3
Duggan v. Hobbs, 99 F.3d 307 (3d Cir. 1996)	3
Fraver v. North Carolina Farm Bureau Mutual Insurance Co., 801 F.2d 675 (4th Cir. 1986)	3
Nagy v. Riblet Products Corporation, 79 F.3d 572 (7th Cir. 1996)	3
Williams v. Wright, 927 F.2d 1540 (11th Cir. 1991)	3

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent, CBI-Illinois, Inc. ("CBI") respectfully requests that this Court deny the Petition For Writ Of Certiorari, seeking review of the Seventh Circuit Court of Appeals' opinion in this case. That opinion is reported at 106 F.3d 1368 (7th Cir. 1997). (For the convenience of the Court, all citations to the opinion will be to the opinion attached in the Appendix to the Petition.)

STATEMENT OF THE CASE

Petitioner Anthony W. Cvelbar's ("Cvelbar") Statement of the Case omits an important fact that was before the District Court and the Court of Appeals which justified summary judgment for Respondent CBI-Illinois, Inc. ("CBI") in this case.

The Employer-Employee Agreement ("Agreement") entered into by Cvelbar and his employer on March 22, 1990, was not executed in isolation. Rather, the Agreement was one of five identical agreements executed with top management employees for the purpose of providing deferred compensation to those employees. (Petition Appendix ("Pet.App.") 2, 4 n.1, 5 n.2, 14; Respondent Appendix ("Res.App.") 1.)

REASONS FOR DENYING THE WRIT

This Court should deny Certiorari in this case for two reasons: 1) the Question Presented by Cvelbar's Petition simply is not an issue presented by the facts of this case; and 2) even if the Question Presented in the Petition were an issue in this case, it is not an issue on which the courts of appeals are in conflict.

I. PETITIONER'S QUESTION PRESENTED IS NOT RELEVANT TO THIS CASE

The question of whether a one-person agreement is an ERISA plan is not presented by the facts of this case, and is not determinative of the outcome in this case. Petitioner's Agreement is not a "one-person" agreement. Rather, it was executed in connection with four other identical agreements. The Court of Appeals refers to this fact throughout its opinion, and Cvelbar admits this fact in his own affidavit. (Pet.App. 2, 4 n.1, 5 n.2, 14; Res. App. 1, 2.) Given that resolution of the question presented for review in this Court will not affect the outcome of this case, it would be inappropriate for this Court to grant certiorari on the Question Presented in the Petition.

The actual "question presented" to the District Court and the Court of Appeals was whether an employment agreement which provides deferred compensation to a member of a select group of management employees and which was one of five identical agreements providing deferred compensation to a select group of management employees, could be an ERISA plan if it otherwise met the requirements of an ERISA plan. However, it would be similarly inappropriate for the Court to grant certiorari on this issue because the courts of appeals are not in conflict on this issue. Simply stated, no issue presented in this case is appropriate for review by this Court.

II. THE COURTS OF APPEALS ARE NOT IN CONFLICT WITH RESPECT TO PETITIONER'S QUESTION PRESENTED

Even assuming that Cvelbar's Question Presented were actually an issue presented by the facts of this case, it would still be unnecessary for the Court to grant cer-

tiorari in this case. The courts of appeals are not in conflict with respect to the Question Presented in the Petition. Rather, the courts of appeals are in accord on this issue.

The Third, Fourth, Seventh, Ninth, and Eleventh Circuit Courts of Appeals have all held that a single-person agreement *can* be an ERISA plan if it otherwise meets ERISA's requirements. *See Duggan v. Hobbs*, 99 F.3d 307, 312 (3d Cir. 1996); *Biggers v. Wittek Industries, Inc.*, 4 F.3d 291, 297-8 (4th Cir. 1993); *Cvelbar v. CBI-Illinois, Inc.*, 106 F.3d 1368, 1376 (7th Cir. 1997); *Williams v. Wright*, 927 F.2d 1540, 1545 (11th Cir. 1991). CBI has been unable to identify any court of appeals that has held that a single-person agreement *cannot* be an ERISA plan.

Cvelbar is able to cite to only one court of appeals decision, *Fraver v. North Carolina Farm Bureau Mutual Insurance Co.*, 801 F.2d 675 (4th Cir. 1986), holding, arguably, that a one-person agreement is not an ERISA plan. However, a closer examination of *Fraver* reveals that the court in that case did not hold that a one-person agreement could *never* be an ERISA plan. Furthermore, the existence of the more recent Fourth Circuit Court of Appeals' decision in *Biggers* establishes that the position of the Fourth Circuit Court of Appeals is in accord with the other courts of appeals on the Question Presented.

Finally, the decision of the Court of Appeals in the present case does not contradict the prior holding of the Court of Appeals in *Nagy v. Riblet Products Corporation*, 79 F.3d 572 (7th Cir. 1996). In *Nagy*, the Court of Appeals held that "[c]ontracts between an employer and a single worker do not become ERISA trusts or plans . . . *just because* they deal with future payments." 79 F.3d at 574 (emphasis added). This holding does not exclude the pos-

sibility that such a contract *could be* an ERISA plan if it meets the other requirements of ERISA, as stated by the Court of Appeals in the present case. Thus, no contradiction exists in the Seventh Circuit on the Question Presented by the Petition.

Given that no conflict exists between the courts of appeals or within the Seventh Circuit Court of Appeals on the Question Presented in the Petition, this Court should deny certiorari. Moreover, there is no need for this Court to grant certiorari to "settle an important question of federal law." The courts of appeals and the United States Department of Labor, the agency charged with administration of ERISA, are in harmony on both the Question Presented in the Petition and the question actually presented by the facts of this case.

CONCLUSION

WHEREFORE, Petitioner prays that this Court deny the Petition For Writ Of Certiorari.

Respectfully submitted,

STEPHEN D. GAY
Counsel of Record
HUSCH & EPPENBERGER
101 S.W. Adams Street
Suite 800
Peoria, Illinois 61602
(309) 637-4900
Attorney for Respondent

RESPONDENT'S APPENDIX

[Filed August 16, 1995]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

ANTHONY W. CVELBAR, Plaintiff,	)	
vs.	)	Case No. 95-1127
CBI-ILLINOIS, INC., a Delaware corporation, Defendant.	)	

STATE OF ILLINOIS
COUNTY OF PEORIA—ss.

AFFIDAVIT OF ANTHONY CVELBAR

Anthony Cvelbar, being first duly sworn upon oath, deposes and says, that if called as a witness, he could competently testify to the following matters:

1. I told the president, Ron Morgan, in late 1989 or early 1990, that if an alternative job opportunity presented itself, I would pursue it because of the uncertainty of my future in our organization.

2. In early 1990, I was first informed that an employment agreement for certain senior management officials was being considered in order to induce us to stay with the organization in these times of uncertainty.

3. The employment agreement was drafted by Ron Morgan, president, and Dave Radley, attorney. The agreement was for a period of five years and was to be extended annually for one additional year each year.

4. At the time the agreement was drafted [several weeks prior to the date it was signed], Mr. Morgan and I discussed the fact that Section 280G of the Internal Revenue Code of 1986 could be applicable only if a change of control took place within one year of the contract date or any later significant amendment.

5. At the first anniversary date of the contract, in March of 1993, I again discussed Section 280G with Mr. Morgan, and it was decided not to request the Board to extend the contracts [all five of them] for a new five-year period because such extension could possibly be construed as a significant amendment that would trigger the presumption set out in Section 280G(b)(2)(C) of the Code. Mr. Morgan and I concluded that once we got by the 12-month period, we would then be safe from the application of the golden parachute rules.

6. In the fall of 1991, I was requested to voluntarily relinquish my rights under the Agreement in question. Specifically, I was offered stock options in Commerce Bankshares, Inc. in exchange for the waiver of my unilateral right to quit my job and thereby "trigger" the benefits. At that time, the Defendant did not want to incur the payments due to me under the contract, unless my employer elected to terminate my employment.

7. On October 6, 1992, I was advised in writing that my position had been eliminated and for that reason I was terminated. A true and correct copy of the Memorandum is attached to my Affidavit.

8. The October 6, 1992 Memo was handed to me by Mr. Callow at 5:05 P.M. At that time and date, Mr. Callow entered my office, sat in a guest chair, and handed the document to me without comment. After I read the Memo, I asked "Why?" and he responded that my position had been eliminated. I asked Mr. Callow when my termination was effective, and he responded "immediately," and informed me to make arrangements to remove my personal effects from the office later. I then followed Mr. Callow's directive by immediately ceasing my duties and leaving the building. At approximately 7:00 P.M. on October 6, I returned to my office and packed up and removed my personal belongings. My building keys were returned shortly thereafter.

9. I had no knowledge that Peter Callow perceived that I had a negative attitude until I read his Affidavit dated August 2, 1995.

FURTHER AFFIANT SAYETH NOT.

DATED: 8/14/95

/s/ ANTHONY CVELBAR

SUBSCRIBED AND SWORN TO BEFORE
ME THIS 14th DAY OF AUGUST, 1995.

/s/ BONNIE J. FARRELL, August 14, 1995

[Notarial Seal]